

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DERRICK JAMES PRICE

Claimant

VS.

NATIONAL DEALERSHIP DETAILING, INC.

Respondent

AND

NATIONWIDE MUTUAL INSURANCE CO.

Insurance Carrier

Docket No. 1,026,820

ORDER

Respondent and its insurance carrier (respondent) request review of the May 10, 2006 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

The Administrative Law Judge (ALJ) granted claimant's request for medical treatment and temporary total disability benefits. In doing so, he implicitly concluded claimant suffered an accidental injury arising out of and in the course of his employment on August 16, 2005 and that timely notice was provided.

The respondent requests review of this decision alleging the ALJ erred. Respondent argues that claimant failed to meet his burden of proving both an accidental injury arising out of and in the course of his employment with respondent and timely notice of that accident as required by K.S.A. 44-520.

Claimant argues the preliminary hearing Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant is employed as a car detailer. He alleges a one time accidental injury to his right foot occurring on August 16, 2005. Claimant testified that he stepped on the rear

wheel of a Lincoln Navigator to clean the top and slipped because the wheel was covered with a slick cleaning substance. Claimant jumped from the car and landed on his feet, injuring his right foot. There were no witnesses to claimant's accident and he did not ask for any treatment from his employer on that day. According to claimant, he believed his foot injury would improve. He also testified that he told Noah Mott and Mike Spalding of his foot injury sometime that same week.

Claimant continued working but the pain in his foot became worse as time went on and he began to limp. He applied some home remedies and "a manager"¹ noticed him limping and suggested he go see a doctor. Claimant presented to the Emergency Room at the Olathe Medical Center on October 11, 2005. What he told the physician at the ER is not included within the record. Claimant indicates he was referred to Johnson County Orthopedics for follow-up.

There is some suggestion in the file that claimant first attempted to have his medical bills covered by Medicaid. Claimant testified that the hospital contacted him and told him that this should be a workers compensation matter.

On October 18, 2005, Mr. Mott apparently noticed claimant was again limping and claimant told him of the injury. The two of them then contacted Heath Mayor, the managing partner for the company, on the phone. Mr. Mott indicated that claimant had been having difficulty working before that time due to leg or foot pain. At that point, a workers compensation claim and investigation was initiated within respondent's company. Mr. Mayor contacted claimant on October 20, 2005 and attempted to fill out a workers compensation form with claimant's assistance. According to Mr. Mayor, claimant didn't tell him about slipping off a tire. Rather, claimant described an injury resulting from walking on concrete all day.

Mr. Mott testified that he noticed claimant was limping a few weeks before October 18, 2005. He also testified that when he first noticed claimant limping, "there was no real discussion of exactly how it happened. It wasn't until about a week later that somebody that I worked with said that he fell off a tire, but I have no - I have no knowledge myself of any particular instance happening."² He went on to say that he went to claimant and claimant confirmed that he had, indeed, fallen off a tire. Mr. Mott denied claimant told him of any injury before that time.

Respondent argues the ALJ erred in concluding claimant met his burden of proof. Simply put, respondent contends that because claimant waited so long to disclose the facts

¹ P.H. Trans. at 8.

² *Id.* at 54.

surrounding his August 16, 2005 accident and has been inconsistent in his recitation of the events, that he is not to be believed.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁴ The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important.

Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In granting claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed claimant's testimony over that of respondent's representatives. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. Accordingly, the Board affirms the ALJ's preliminary hearing Order.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁵

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven J. Howard dated May 10, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2006.

BOARD MEMBER

c: Michael J. Joshi, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ K.S.A. 2005 Supp. 44-501(a).

⁴ K.S.A. 2005 Supp. 44-508(g).

⁵ K.S.A. 44-534a(a)(2).